

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
TCI of Pennsylvania, Inc.)	
)	
Appeals of Local Rate Orders of the City of)	File Nos.
Pittsburgh, Pennsylvania (CUID No. PA1855))	
)	CSB-A-0181 & CSB-A-0304

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2003

Released: April 16, 2003

By the Deputy Chief, Policy Division, Media Bureau:

INTRODUCTION

1. TCI of Pennsylvania, Inc. ("TCI"), the franchised cable operator serving the City of Pittsburgh, Pennsylvania, has appealed two local rate orders adopted by the City of Pittsburgh ("City") on March 21, 1995,¹ that rejected TCI's proposed basic service tier ("BST") rates as unreasonable because TCI failed to properly notify its customers of a proposed raise increase. We consolidate these appeals because the legal arguments presented by the parties are identical and the interests of administrative efficiency will be advanced thereby. The City opposes the appeal. Based upon our review of the record, we grant in part and deny in part TCI's appeal.

II. BACKGROUND

2. The Communications Act provides that, where effective competition is absent, cable rates for the BST are subject to regulation by franchising authorities.² Rates for the BST should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.³

3. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.⁴ In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as a reasonable basis for that decision exists.⁵ The Commission will reverse a franchising authority's rate decision only if it determines

¹ Resolution Nos. 215 and 216.

² 47 U.S.C. § 543(a)(2).

³ 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

⁴ 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

⁵ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 (1993) ("Rate Order"); *Third Reconsideration Order*, 9 FCC Rcd 4316, 4346 (1994).

that the franchising authority acted unreasonably in applying the Commission's rules. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.

4. An operator that wants to increase its BST rate has the burden of demonstrating that the increase is in conformance with the Commission's rules.⁶ In determining whether the operator's rates conform with our rules, a franchising authority may direct the operator to provide supporting information.⁷ After reviewing an operator's rate forms and any other additional information submitted, the franchising authority may approve the operator's rate increases or issue a written decision explaining why the operator's rates are not reasonable.⁸ If the franchising authority determines that the operator's proposed rates exceed the maximum permitted rate ("MPR") as determined by the Commission's rules, it may prescribe a rate different from the proposed rate or order refunds, provided that it explains why the operator's rate or rates are unreasonable and the prescribed rate is reasonable.⁹

5. On February 23, 1995, TCI filed with the City its FCC Forms 1205 and 1210. The Form 1205 proposed an increase in the rates for installation and equipment rates. The Form 1210 proposed an increase in the BST rates for programming services.

6. The City Council, which is authorized to review and approve rates for the BST, voted on March 21, 1995 to deny the proposed rate increases. The Council rejected the Form 1205 proposed rate increase for installation and equipment because it failed to "comply with the standards set forth" by the Commission.¹⁰ Specifically, the Council concluded that the notice TCI sent to its subscribers about increasing rates failed to provide the public with sufficient notice and the Council was therefore "unable to conduct a proper review of the Form." The Council also rejected the Form 1210 proposed rate increase for the BST because the form failed to provide sufficient information for it to determine the reasonableness of the request and it further concluded that the form was not in compliance with Commission regulations.¹¹ The Mayor signed the orders on March 24, 1995, and the recording of Resolutions 215 and 216 in the Council's Resolution Book occurred on March 30, 1995. TCI is challenging the City's rejection of the proposed Form 1205 and 1210 rate increases.

III. DISCUSSION

7. TCI has raised three issues on appeal. TCI initially argues that the orders should be rejected because of procedural defects. TCI also argues that the City wrongly denied the rate increases because the City misinterpreted the notice requirement under section 76.932 of the Commission's rules. Finally, TCI argues that the City's orders rejecting the increases should be reversed because the Council did not explain the alleged filing deficiencies.

8. TCI alleges that the City's orders are procedurally defective because they were released late – more than 30 days after the rate forms were filed on February 23, 1995. According to TCI, the City's orders denying the rate increase requests were not official until they were recorded in the City Council's Resolution Book and released. TCI alleges that the Resolutions were not recorded and released

⁶ 47 C.F.R. § 76.937(a).

⁷ Rate Order at 5718.

⁸ 47 C.F.R. § 76.936; *see Ultracom of Marple Inc.*, 10 FCC Rcd 6640, 6641-42 (1995).

⁹ *See Century Cable of Southern California*, 11 FCC Rcd 501 (1995); *TCI of Iowa, Inc.*, 13 FCC Rcd 12020 (1998).

¹⁰ Resolution 215.

¹¹ Resolution 216.

until March 30, 1995. In addition, TCI alleges that it did not receive a copy of the Resolutions until April 3, 1995. As a result of this late notice, TCI argues that its rates became effective on March 25, 1995. TCI argues that the 30-day deadline¹² was established by the Commission to provide cable operators with some degree of certainty. In support of this proposition, TCI cites *TCI of Greensburg*,¹³ which held that a local franchising authority lost its refund authority because it failed to timely adopt an accounting order. Therefore, TCI asserts that the City's orders should be reversed.

9. In opposition, the City asserts that it timely reviewed TCI's Forms 1205 and 1210 and therefore satisfied the 30-day requirement under section 76.932 of the Commission's regulations. The City states that the City Council voted on March 21, 1995 -- twenty-six days after TCI's February 23, 1995 filing -- to deny the proposed rate increase, and the text of the Council's decision was telecast live and replayed that evening on a municipal channel of TCI's system. The City further alleges that it provided TCI actual notice by telephone of the Council's action that day and a copy of the full text of the Resolutions was faxed to TCI immediately after the meeting. The Mayor signed the orders on March 24, 1995 -- twenty-nine days after the February 23, 1995 filing. The City alleges that the recording of the Resolutions in the Council's Resolution Book occurred on March 30, 1995, but in any event, is a purely ministerial act. A certified copy of the Resolution was delivered to TCI on April 3, 1995. Finally, the City argues that even if one assumes the City's orders were late, the City only loses the opportunity to order refunds but still retains the authority to regulate rates on a prospective basis. Therefore, the City could only lose its authority to order retroactive refunds under section 76.933.

10. In reply, TCI alleges that the City does not dispute that it missed the 30-day deadline because the official recording and delivery of the Resolutions did not occur until after the deadline. TCI asserts that the orders are untimely.

11. Pursuant to the Commission's rules, a cable operator's proposed rates go into effect 30 days after their submission to the franchising authority unless the franchising authority disapproves the rates or the review period is tolled by the franchising authority in writing.¹⁴ A franchising authority must issue a written order whenever it rejects a rate for the BST in whole or part.¹⁵ A rate decision may be issued by resolution, ordinance, letter, or other suitable form.¹⁶ Public notice must be given of any decision rejecting a rate increase.¹⁷ The Commission's rules leave the method of giving public notice to local authorities.¹⁸ In this instance, TCI makes no claim that local laws or regulations were not followed in the City's release of its orders. The Council, which is delegated the authority to determine BST rates, adopted the text of the Resolutions on March 21, which were faxed to TCI immediately following the meeting. TCI was also notified of the Council's actions by telephone that same day. The Resolutions carry an enactment date of March 21. We therefore find the orders were timely issued.

12. TCI also challenges the City's rejection of Forms 1205 and 1210 based upon the subscriber notice requirements of section 76.932 as follows:

¹² 47 C.F.R. § 76.933.

¹³ 10 FCC Rcd 6638 (1995).

¹⁴ 47 C.F.R. § 76.933(a).

¹⁵ 47 C.F.R. § 76.936(a).

¹⁶ *Chillicothe Cablevision, Inc.*, 10 FCC Rcd 6055, 6056 (1995).

¹⁷ 47 C.F.R. § 76.936(b).

¹⁸ See *Falcon Classic Cable v. McCreary City, KY*, 15 FCC Rcd 57171, 57178 (2000) (public notice under section 76.936(b) should be given in a manner consistent with applicable local law or regulations governing a franchising authority's rate review).

a cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. The notice should include the name and address of the local franchising authority.¹⁹

13. TCI alleges it sent a notice to subscribers advising them of an impending cable programming service tier (“CPST”) increase and also to “disclose at the same time that additional rate changes were being considered regarding BST service and equipment” rates. TCI states that the main purpose of its notice was to provide CPST subscribers with notice, pursuant to section 76.964 of the Commission’s rules, that their rates would be increased.²⁰ TCI states that the inclusion of information regarding the BST rate increase was made voluntarily to keep subscribers informed of the BST rate request proceeding rather than serving as the mandatory disclosure notice under section 76.932 of the Commission’s rules.²¹ TCI further alleges that it planned to send a second subscriber notice specifically to BST subscribers before implementing a rate increase. TCI argues that there is no requirement that cable operators file the notice at the time the Forms 1205 and 1210 are filed. Finally, TCI argues that such a notice would be of little or no benefit to subscribers because the franchising authority can reduce the amount or approve a substantially lesser amount than is requested. Therefore, TCI claims, it planned to file another notice 30 days before any new BST rates were to become effective which would have been consistent with the requirements of section 76.932.

14. In opposition, the City alleges that TCI’s notice did not comply with the notice requirement in section 76.932. The City cites the *Rate Order* to support its position, alleging that the purpose of section 76.932 is to insure that “interested parties have an adequate opportunity to comment” and to protect subscribers’ due process rights to review and comment on the proposed rate increase prior to its being approved.²² The City therefore argues that providing notice after the rates are approved provides no benefit to the subscribers. The City states that TCI’s notice was deficient because it lacked details on the increase. Finally, the City argues that it relied upon the notice TCI is required to provide directly to each customer because the notice provided by City regulations by newspaper may not reach all subscribers and is not a sufficient substitute. Therefore, the City states that it was unable to review the merits of the proposed increase until TCI complied with the notice requirements.

15. In reply, TCI alleges that the notice it sent regarding CPST rate increases included language alerting subscribers that the company had submitted proposed BST rate increase requests, but was not meant to serve as notice of an effective increase in the BST as required under section 76.932. TCI argues that the rules do not require it to provide precise details of an increase in BST rates more than 30 days before the increase is implemented. TCI also argues that the City’s reliance on the Report and Order is misplaced because the City relies on report language rather than the rule.

16. TCI gave subscribers notice that it had filed forms requesting a rate increase for the BST. TCI was not required to do so. A cable operator “may” give notice to subscribers of a proposed BST rate change request at the time it is filed with the franchising authority, but “must” provide notice of any increase in the BST at least 30 days before any proposed increase is effective.²³ Although our regulations do not specify that a cable operator must provide notice to subscribers of a rate increase at the same time

¹⁹ 47 C.F.R. § 76.932 (1996). The current notice requirement is in 47 C.F.R. § 76.1603.

²⁰ 47 C.F.R. § 76.964 (1996). Section 76.964 provided a similar notice requirement as section 76.932. The current notice requirement is in 47 C.F.R. § 76.1603.

²¹ 47 C.F.R. § 76.932 (1996). The current notice requirement is in 47 C.F.R. § 76.1603.

²² Opposition at 4-5, Rate Order at 5712-5713 (1993).

²³ *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 9535 (2000).

it files forms with the local franchising authority, our regulations do require that the local franchising authority have procedural laws and regulations that “provide a reasonable opportunity for consideration of the views of interested parties.”²⁴ The purpose of the Commission’s notice requirement is to provide subscribers with ample time to react and, if they so elect, to cancel any service they no longer wish to receive due to the rate change.²⁵ The notice that TCI provided was not sufficient to permit TCI to effectuate the rate increase, but TCI states that the notice provided BST subscribers was not intended to satisfy the Commission’s 30-day notice requirement. TCI intended to provide that notice at a subsequent date. TCI was not in violation of our 30-day notice rule. The City cannot rely on the issue of notice in this case in refusing to review TCI’s rate forms.

17. TCI also argues that the City’s order rejecting Forms 1205 and 1210 should be reversed because the Council did not explain the alleged filing deficiencies. According to TCI, franchising authorities are required to give a reasonable explanation for their decisions but in this instance, the City did not explain the nature of the alleged deficiencies in either the Form 1205 or 1210. Moreover, TCI argues that the Form 1210 rate increase only concerned an inflation adjustment. Therefore, TCI argues that the City improperly rejected FCC Forms 1205 and 1210.

18. In rejecting FCC Form 1205, the City’s Resolution 215 concluded that “without sufficient public notices provided by TCI, the City is unable to conduct a proper review of the Form 1205.”²⁶ In rejecting FCC Form 1210, the City’s Resolution 216 concluded that the Form 1210 contained insufficient support to determine the reasonableness of the request, the Form 1210 was not in compliance with the applicable FCC regulations, the notice was insufficient, and “the proposed increase in rates for the Basic Service in TCI’s Form 1210 is denied, and TCI of Pennsylvania, Inc. is ordered not to place the rates into effect.”²⁷

19. The City alleges that it was unable to conduct a substantive review on the merits of the proposed BST rate increase requests, which would have included the receipt and evaluation of public comments, until TCI had provided the correct notice.

20. As we stated in *Falcon Cable Media*, if a franchising authority does not dispute the bases for the figures presented in a cable operator’s rate forms and has not discovered any mathematical errors in the forms, the franchising authority should approve the operator’s rate as derived from those forms.²⁸ The City’s position that TCI’s notice was insufficient does not justify the City’s rejection of TCI’s proposed BST rate increases. If a local franchising authority denies an operator’s proposed rate increase, it must issue a written decision affirmatively demonstrating why the rates are unreasonable.²⁹ The requirement of a written order protects the cable operator’s right to due process by having the local franchising authority explain why it is rejecting the rate and also provides the cable operator with a basis to refile its rate or appeal the local franchising authority’s decision to the Commission.³⁰ As evidenced by previous Commission rulings, local rate orders that summarily or vaguely reject a cable operators proposed rate increase cannot be sustained and will be remanded.³¹ We find the City’s denial of TCI’s

²⁴ 47 C.F.R. § 76.935.

²⁵ *E! Entertainment Television, Inc., c/o Donna C. Gregg, Esq.*, 10 FCC Rcd 922 (1994).

²⁶ Resolution 215.

²⁷ Resolution 216.

²⁸ *Falcon Cable Media*, 13 FCC Rcd 11996, 11998 (1998).

²⁹ 47 C.F.R. § 76.936.

³⁰ Rate Order, 8 FCC Rcd at 5723-24.

³¹ See *Valley Cable TV, Inc.*, 13 FCC Rcd 6378-79, 6379 n. 8 (1998).

rate increase without an adequate explanation does not meet the standards for a written decision under the Commission's rules.³²

21. Finally, TCI also alleges that the City failed to conduct a separate public proceeding on the underlying rate request pursuant to section 76.935 of the Commission's regulations to allow for the participation of interested parties rather than a summary rejection at the Council meeting.³³ TCI further alleges that the City has an obligation to provide the public an opportunity to participate in its cable rate proceedings. The City argues that the opportunity for public participation was dependent upon a "meaningful and widely distributed public notice," which the City relied on TCI to provide directly to each of its subscribers. However, it is the City's regulations which must provide interested parties with an opportunity to express their views.³⁴ The record before us is insufficient to determine whether the City complied with its own procedural requirements and whether TCI and the public had an opportunity to comment on TCI's filings or the City's reaction to them.³⁵ Because we are ruling in favor of TCI on the inadequacy of the City's Resolutions, we need not make a determination regarding the City's possible procedural shortcomings.

IV. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that the Appeals of Local Rate Orders filed by TCI of Pennsylvania on April 20, 1995 **ARE GRANTED IN PART AND DENIED IN PART** and the local rate orders of the City of Pittsburgh, Pennsylvania **ARE REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

23. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division
Media Bureau

³² 47 C.F.R. § 76.936(a), (b); *See* Rate Order, 8 FCC Rcd at 5715; *Falcon Cable Media*, 13 FCC Rcd at 11998.

³³ 47 C.F.R. § 76.935.

³⁴ *Id.*

³⁵ Appeal at 4 and Attachment A.

³⁶ 47 C.F.R. § 0.283.